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Supreme Court of the United States

October Term, 1953

No.

O. A. GREAGER, PETITIONER,

vs.

R. H. LINDSAY COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Your petitioner, O. A. Greager, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit, which, by a divided court, reversed a judgment of the District Court for the District of Colorado denying a decree of specific performance to the respondent.

JURISDICTION

The judgment of the Court of Appeals was entered May 1, 1953, (R. 113). Petition for rehearing was seasonably filed May 29, 1953, (R. 123), and denied June 8, 1953, Circuit Judge Bratton dissenting (R. 124). Mandate was stayed until July 27, 1953, (R. 124).

The jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254 (1).

OPINIONS BELOW

The opinion of the District Court for the District of Colorado (R. 45) was not reported. The majority opinion of the Court of Appeals (R. 107) and the dissenting opinion of Circuit Judge Bratton (R. 112) appear in 204 F2d 129.

QUESTIONS PRESENTED

1. Whether a 3-judge Court of Appeals, with one judge dissenting, should set aside as "clearly erroneous" the findings of intention made by the District Court upon conflicting oral testimony, where such findings are supported by substantial evidence, are consistent with the actions of the parties and are inherently probable; and if so, whether the Court of Appeals should then make its own findings of intention based upon such oral testimony, and, drawing its conclusions of law therefrom, direct entry of judgment for the plaintiff.

2. Whether, under the laws of Colorado, the intention to express an agreement in a formal written contract creates a presumption that the execution of the written instrument shall be a condition of the agreement.

3. Whether the buyer should be granted the equitable remedy of specific performance of a purported oral contract, when, in the course of brief oral negotiations for the purchase of wool,

the seller demanded a written contract, and the buyer's agents thereupon supplied a complex printed form boldly entitled "Wool Purchase Conract," which was then signed by the seller and one of the buyer's agents, (the latter, unnoticed by the seller, signed only as a witness to the seller's signature), but which "Contract" was designed by the buyer to serve only as a memorandum sufficient under the Statute of Frauds to make an oral contract enforceable by the buyer but not by the seller, and on which there has been no performance by either party.

4. Whether, under the laws of Colorado, a memorandum of a purported oral agreement sufficiently states the consideration therefor, where the memorandum is in form a unilateral contract founded upon an executed consideration, i.e., part payment, but where no such payment had in fact been made and the alleged oral agreement was completely bilateral.

5. Whether, under the laws of Colorado, a memorandum of a purported oral contract sufficiently sets forth all the terms and conditions thereof and the consideration therefor, where no custom or usage is shown, and where:

(1) The price discussed was 80¢ per pound, but the memorandum provides a price of 39.6¢ per pound for buck wool (1200 pounds), 52.7¢ per pound for black wool (355 pounds) and 79.2¢ per pound for all other wool.

(2) Although not mentioned in the purported oral agreement, the memorandum provides:

(a) That advance payments should bear interest at the rate of 4% per annum,

(b) That the seller guaranteed the wool to be in good merchantable condition, well tied, free from dip, spear grease, sisal twine and excessive burrs, and sand, and

(c) That the seller is required to accept buyer's draft as payment.

STATUTE AND RULE INVOLVED

1941 Session Laws of Colorado, page 826, § 4 provides:

(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum of the contract or sale be signed by the party to be charged or his agent in that behalf.

The Federal Rules of Civil Procedure provide:

Rule 52, Findings by Court

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

STATEMENT OF THE CASE

This action is concerned with the existence and enforceability of an alleged contract for the sale and purchase of wool (R. 2-4). The seller, petitioner here, is a 72-year old stockman, of Norwood, Colorado, (R. 85). The buyer, respondent here, is a wool merchant incorporated in Massachusetts, with its principle offices in Boston, and represented in this transaction by G. A. Hansen, a vice-president and director, with offices in Salt Lake City, Utah, and by William Kelly, its resident buyer at Montrose, Colorado. (R. 8, 16, 29).

At the close of a brief conversation between the seller and the buyer's agents, Hansen and Kelly, the seller and Hansen signed a printed form entitled "Wool Purchase Contract" (Plaintiff's Exhibit A, R. 4, 9, 43) which had been supplied by Hansen and which the seller had been led to believe was a formal written contract (R. 85-6). Not called to the seller's attention was the fact that Hansen signed only as a witness to his (seller's) signature (R. 86, 92). When the seller discovered that the "Wool Purchase Contract" was designed to serve only as a memorandum binding him and not as a formal, mutually binding contract, he refused to proceed further with the transaction (R. 92).

Shortly thereafter, the wool market rose sharply (R. 19, 40) and the buyers brought this action for specific performance of an alleged contract, and for damages of $30,000.00 (R. 2). The seller's answer denied the existence of the contract and pleaded the Colorado Statute of Frauds (R. 34-8). A hearing was held on the buyer's motion for a preliminary injunction (R. 6-34), after which, because of the difficulty of proving damages in the then highly unstable wool market, the parties stipulated that each of them should perform according to the so-called "Wool Purchase Contract," but that if this "Wool Purchase Contract" should be held invalid at the trial, the buyer should pay the seller an additional 20¢ per pound, i.e., a total price of $1.00 per pound (R. 39-42).

Immediately prior to the trial, the petitioner moved for a summary judgment (R. 44-5). The trial court denied the motion and proceeded directly into the trial of the action (R. 61-2). The court found the issues generally for the petitioner, and held that, "No mutually binding oral contract of purchase and sale of (the seller's) 1951 wool clip was made or intended to be made" (R. 49) and that the instrument characterized by the buyer as a 'Wool Purchase Contract' does not state with reasonable certainty "the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made" (R. 55), and was not, therefore, a sufficient memorandum under the Colorado Statute of Frauds. Judgment was entered for the seller in accordance with the stipulation (R. 57).

Upon appeal, the Court of Appeals, Circuit Judge Bratton dissenting in a written opinion (R. 112), held that the trial court's finding of fact with respect to intention was clearly erroneous, and reversed the judgment (R. 107-12).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In setting aside as "clearly erroneous" the finding of the trial court that no firm committment was made by the respondent for the purchase of the petitioner's wool.

2. In setting aside as "clearly erroneous" the finding of the trial court that no mutually binding oral contract of purchase and sale was made, or intended to be made, by the parties.

3. In finding that there was a definite offer by the respondent to purchase petitioner's wool at 80¢ per pound and an unqualified acceptance of that price by the petitioner.

4. In holding that the alleged oral agreement of purchase and sale was complete, certain and definite and so considered by the petitioner for several months.

5. In finding that the petitioner intended that the alleged agreement should be incorporated in the so-called "Wool Purchase Contract."

6. In finding that the petitioner intended a formal written contract to be only a memorial of the "completed oral agreement" and not a condition of its validity.

7. In finding that petitioner executed the so-called "Wool Purchase Contract" for the purpose of satisfying the Statute of Frauds.

8. In holding that, under Colorado law, the so-called "Wool Purchase Contract" is a sufficient memorandum of the alleged oral contract.

9. In directing the trial court to enter judgment for respondent (plaintiff).

10. In reversing the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1. In setting aside the findings of the trial court with respect to intention to contract orally, the majority of the Court of Appeals has extended the scope of appellate review to embrace what amounts to a trial *de novo* on the issue of intent, contrary to the clear mandate of Rule 52(a), Federal Rules of Civil Procedure, of the decisions of this Court in *U. S. vs. Nat'l Assn. of Real Estate Bds.*, 339 U. S. 485, 495-96, *U. S. vs. Yellow Cab Co.*, 338 U. S. 338, and *Adamson vs. Gilliland*, 242 U. S. 350, and of its own decision in *Keokuk Steel Casting Co. vs. Lawrence*, 178 F2 788. From these authorities, it appears that the scope of appellate review does not extend to those findings of intention which are based upon positive oral testimony and are neither inherently improbable, nor contradicted by documentary evidence or the actions of the parties.

The Inherent Probabilities

Your petitioner, a 72-year old stockman from a rural village of 294 people (R. 87), was dealing with two relative strangers, one of them from Boston and Salt Lake City (R. 8, 20). The widely recognized distrust of country folk for city people has probably not escaped the notice of this Court. Further, he was negotiating over a sale which involved half of his year's production and would not be consummated for more than 6 months (Plaintiff's Exhibit A, R. 4, 9, 43). He insisted at the trial that he did not intend to enter into an oral contract; that he intended to sell his wool under written contract (R. 87). Is this not inherently probable under the circumstances?

Moreover, at the hearing on the respondent's application for a preliminary injunction, buyer's agents testified to similar intentions. Hansen testified, "We always have a preliminary conversation and then reduce it to this contract *which completes the deal.*" (R. 23, emphasis added; quoted by the trial court at R. 51), indicating he considered the deal *in*complete until the so-called "Wool Purchase Contract" had been signed. Kelly testified that he did not feel the contract was binding until the "Wool Purchase Contract" was signed (R. 83). It is axiomatic that contractual relations begin when and how the parties intend, (*Massey vs. Gibbs,* 169 Minn. 100; 210 N. W. 872) and it cannot be doubted that here, in the minds of the parties, those relations did not commence until, with respect to the seller, a contract was executed by both parties, and, with respect to the buyer's agents, the so-called "Wool Purchase Contract" was signed by the seller.

The Transaction

After some small talk with the seller, Hansen asked, "Would you take 80¢ for your wool?" To which the seller replied, "You just write up that contract." (R. 86.) Why did Hansen use the word "would," a word of condition, unless there was a condi-

tion? And, if so, what was the condition? From the testimony of Hansen and Kelly quoted in the preceding section, the conclusion is irresistible that the condition was the signing by the seller of the buyer's Trojan horse, the so-called "Wool Purchase Contract." The seller's answer was a direction to "write up that contract." (R. 86.) Did he mean the so-called "Wool Purchase Contract," or a formal written contract? Reason compels the belief he meant a formal written contract and assumed that the buyer's instrument fulfilled this requirement (R. 87). Was not it boldly labeled "Wool Purchase Contract"? (Plaintiff's Exhibit A, R. 4, 9, 43). Had not it been referred to throughout by buyer's agents as a "contract"? (R. 25, 86.) In any event, nothing was said by either party which the other party could reasonably construe as a manifestation of assent to be bound by an *oral* contract.

Additional support for this view is supplied by the fact that the conversation terminated upon the topic of price. The so-called "Wool Purchase Contract" contained provisions for discounts amounting to more than $1,000.00, for strong express warranties and for 4% interest on advances (Plaintiff's Exhibit A, R. 4, 9, 43). These variances between the oral negotiations and the so-called "Contract" will be more fully analyzed in a later section, but are important here as strongly persuasive evidence of the fact that the parties did not contemplate binding themselves in their conversation. "All the terms which the parties intend to include in the formal agreement must be shown to have been agreed upon, to constitute a meeting of the minds of the parties to make the contract enforceable." (*American Merchant Marine Ins. Co. vs. Letton*, 9 F2 799, 801; certiorari denied 271 U. S. 668. To the same effect, *Arnold vs. R. Rothschild's Sons Co.*, 37 App. Div. 564, aff'd. without opinion 164 N. Y. 562.)

Subsequent Actions of the Parties

Shortly before March 28, 1951, the seller discovered he had

been tricked into signing an instrument deliberately designed for enforcement *against*, but not *by*, him, so he immediately notified the buyer of his withdrawal (Plaintiff's Exhibits C and D, R. 103, 104, 43, 92). On or about April 30, while the wool market was below 80¢ per pound, Hansen attempted to persuade him to go through with the transaction, but the seller refused (R. 19). At the time of the hearing of May 9, 1951, the wool market had reached a price of $1.00 per pound (R. 39). The seller's refusal to proceed with the transaction on April 30 is indicative of the strength of his conviction he had not entered into a contract with the buyer.

Misconceptions of the Majority of the Court of Appeals

Although Circuit Judge Bratton found that the trial court's "critical and dispositive finding of fact is supported by substantial evidence," the majority of the court held it to be "clearly erroneous." (R. 112.) The view of the majority was apparently predicated upon the following misconceptions of the case.

a. The majority opinion relates seller's testimony thus: "—(the seller) told the agent 'You just write up that contract'; and that he then went into the kitchen and told his wife that he *had* contracted his wool for 80¢.—" (R. 109, emphasis added). A footnote to the opinion sets forth the verbatim testimony thus: "(Seller) said, 'You just write up that contract.' While he was writing it up, I went into the dinette—not the kitchen—and told the Missus, my wife, 'I *am* contracting my wool at 80¢'." Whether he used the words "*had* contracted" or "*am* contracting" *after* the oral negotiations were terminated and *before* the so-called "Wool Purchase Contract" was signed is, of course, highly significant. His testimony discloses that his "contracting" was incomplete at that time (R. 86).

The footnote proceeds to quote from the seller's cross-examination, "I thought they did [offer to pay me 80¢]. I changed

my mind when I saw that signature." Evidently the majority of the court interpreted this as an admission that a firm offer had been received. Clearly, however, the seller was referring to Hansen's signature on the so-called "Wool Purchase Contract" and his answer concerned the offer he assumed was contained in that instrument. How else could the character of Hansen's signature have "changed his mind?"

b. The majority of the court then found critical significance in the fact that the seller, in his letter of withdrawal, did not deny that the buyer had offered him 80¢ or that he had agreed to sell for that price (R. 110). Does the failure to anticipate a contention become an admission of the contention? Since the record discloses that the seller's attorney prepared the letter of withdrawal (R. 92) it would not have been amiss for the Court to assume that the attorney discussed the entire matter with the seller, found no basis for a contention by the buyer that there was an oral contract and, accordingly, rested his opinion of the transaction upon the so-called "Wool Purchase Contract" alone. And, of course, that was the procedure actually followed.

That the seller's attorney was not alone in his view of the case is attested by the fact that the buyer took up the gauntlet on the same ground. The letter of the seller's attorney to the buyer invited correspondence on any facts which might change the attorney's opinion of the transaction (Plaintiff's Exhibit D, R. 104, 16, 43). No answer to that invitation is found in the record. The issue was obviously drawn over the defective character of the "Wool Purchase Contract." At the hearing of May 9, 1951, the buyer and its counsel argued strenuously that this so-called "Contract" was not defective and was the one and only contract between the parties. (R. 6, 7, 9, 11, 15-16.) The core of the stipulation prepared by the buyer's counsel was the "validity" or "invalidity" of the "Wool Purchase Contract." (R. 40, 41). A memorandum of an oral contract is only evidence and

has neither "validity" nor "invalidity." (*Friedman & Co. vs. Newman*, 255 N. Y. 340). The seller's case has never deviated from the premise that there was no oral contract: the buyer's case never deviated from its contention of a written contract until after District Judge Knous announced at the hearing of May 9, 1951, that "there is a serious question about the validity of this contract" (R. 32). The majority of the court should have found deeper significance in the fact that the buyer did not raise earlier its reliance on an oral contract.

c. The majority of the court found that for several months the seller had considered that he had entered into an oral agreement of purchase and sale (R. 110). This is directly opposed to the seller's direct testimony (R. 87) and the findings of the trial court (R. 52, 99), and is supported only by the misquoted and misconstrued sections of the seller's testimony quoted in *a.* above.

d. The majority of the court then proceeded to find that the parties intended that the terms of their oral agreement should be incorporated in the so-called "Wool Purchase Contract," and that it was quite obvious that seller signed it for the purpose of satisfying the Statute of Fraud. As opposing counsel admitted in their argument before the trial court and in their motion for a new trial (R. 60), the "Wool Purchase Contract" is not enforceable against the seller, and it is not disputed that it was the seller who expressed the demand for the preparation of a contract (R. 10, 78, 86). It is not consonant with reason that any competent person would demand the preparation of an instrument designed for his signature only, and then sign it for the protection of the other party, leaving himself unprotected - - - and, as opposing counsel brought out, the seller is no "simpleton" (R. 90). It is conceded that the seller signed the instrument, but to go farther and say that he intended to sign it for the purpose of protecting the buyer is to charge the seller with such little competence in business matters as to void any agreement he might have made.

Briefly, the majority of the court has adopted this theory of the case: A 72-year old stockman entered into an oral contract with two relative strangers for the sale of $30,000.00 worth of wool, and thereafter insisted upon the agreement being put into writing and signed by himself for their protection, leaving himself completely unprotected either by witnesses or by a signed instrument. Merely stating the theory of the majority of the court points out its unsoundness. It is respectfully submitted that, in spite of the fundamental error in the facts upon which the majority of the court based their theory, not only is the theory of the trial court more reasonable than that of the majority of the court but that this is manifestly not a case for the application of the "clearly erroneous" exception to the mandate of Rule 52 (a) *supra*. It would be extraordinary for a finding of intention not to orally contract to be "clearly erroneous" where one experienced trial judge, after hearing testimony from plaintiff's witnesses only, found that "There is a serious question about the validity of this contract" (District Judge Knous, former Chief Justice of the Colorado Supreme Court, at the hearing on plaintiff's application for a preliminary judgment, R. 32); where another experienced trial judge, after hearing the testimony of all the witnesses, found intention *not* to orally contract (R. 52); and where one of the judges of the Court of Appeals found in the record sufficient substantial evidence to support such a finding. Perhaps one judge might have been led into *clear* error, perhaps even two, but could three such experienced judges be so *clearly* in error? In short, are the facts of this case so sharply delineated that the art of judging is not required, that like a lamp, the light is either on or off?

2*a*. The decision of the court below failed to give effect to, and is probably in conflict with, the applicable decisions of the Colorado Supreme Court that reasonable doubt as to whether what passed between the parties was only treaty must be resolved in favor of treaty and against the formation of a contract. The

Colorado court, in construing the effect of negotiations by correspondence, quoted with approval *Warvelle on Vendors,* 2d ed., § 100, p. 132 ". . . if it is reasonably doubtful whether what passed was only treaty, no action can be maintained on them." (*Pierce vs. Marland Oil,* 86 Colo. 59.) The court then went on to state the rule that "whether or not the parties have completed their negotiations, or whether they intend that this agreement should be expressed in a formal written contract, is always dependent upon the circumstances of the particular case."

In short, under the law of Colorado, doubt as to whether the parties have completed their negotiations, or not, is resolved in favor of their not having completed their negotiations. Such doubt in the case at bar, if any persisted after the parties testified, was resolved by the trial court according to Colorado law, that is to say, in favor of incompleted negotiations.

2*b*. The decision of the court below failed to give proper effect to, and is probably in conflict with, the applicable decisions of the Colorado Supreme Court with respect to the sufficiency of a memorandum of an oral contract within the Statute of Frauds where there has been neither payment nor performance under the contract. The "Wool Purchase Contract" is clearly insufficient as such a memorandum for two reasons:

First, the instrument is unilateral in form, purportedly supported by part payment as consideration (Plaintiff's Exhibit A, R. 4, 9, 43). There was, in fact, no part payment made (R. 86). Although the alleged contract was completely bilateral, there is nothing to indicate this fact from the instrument itself (Plaintiff's Exhibit A, supra). *The stated consideration was part payment, not a return promise.* Under Colorado law, a statement of consideration is essential (*Eppich vs. Clifford,* 6 Colo. 493; *Micheli vs. Taylor,* 114 Colo. 258), but counsel found no Colorado cases where a fictional statement of consideration in a

memorandum was considered. In the *Micheli* case, the instrument recited receipt of $1.00 and other valuable considerations, which was no fiction because $1,000.00 had been paid by the buyer, and the balance due was accurately stated. *Williston on Contracts,* Vol. 2, Para. 572, at page 1636, states that, "It is impossible to find even a plausible argument for thus holding that a statement of consideration is necessary, and yet that the statement need not be an accurate one." A highly eminent New York Court of Appeals (including J. J. Cardoza, Pound and Lehman), in *Friedman and Co. vs. Newman,* 255 N. Y. 340, assumed that a memorandum was fatally defective where it did not accurately state the consideration.

The majority of the court below did not consider the effect of the stated consideration, which, according to Hansen, was the agreed consideration (R. 15, 67, 78). The court below, however, found that the consideration was clearly the import of obligation to buy contained in the "Wool Purchase Contract:" "The balance of the price to be paid at time of delivery of the wool, payment of draft on R. H. Lindsay Company" (Plaintiff's Exhibit A, R. 4, 9, 43, 111), and cited *Eppich vs. Clifford* and *Micheli vs. Taylor, supra,* for support. The issue in those cases was not the *existence* of an oral contract. The contracts and partial payments of $25.00 and $1,000.00, respectively, were admitted, and partial payment even on an oral contract for the sale of lands takes the contract out of the Statute of Frauds under the Colorado rule (*Lipscomb vs. Nichols,* 6 Colo. 290). The question there was, admitting the oral contract and the consideration, whether the instruments contained sufficient information thereof so that the court could grant specific performance. Equity will at all times lead its aid to defeat a fraud, notwithstanding the Statute of Frauds (*Lipscomb vs. Nichols, supra*).

The case at bar is more nearly in point with *Morath vs. Perkins,* 86 Colo. 101, decided *after* the *Eppich* case and *before* the

Micheli case, where it was held that the phrase "The balance is to be paid in the following manner," in an "Agreement of Sale and Purchase" signed by both parties, could not reasonably be construed as obligating the buyer to do anything. Also see *Stetson vs. Haigler,* 63 Colo. 200, and *Neal vs. North Fork Land and Cattle Co.,* 73 Colo. 79. The seller contends, and the trial court held in effect (R. 54-5), that the above-quoted phrase of the "Wool Purchase Contract" is only a statement of *when* and *how* the purchase price was to be paid, *if* the buyer decided to buy. It is respectfully submitted that this is a particularly appropriate case for the rule that the words used by the party who draws the instrument should be resolved most strictly against him, not as the Court of Appeals did here, in his favor.

Second, the so-called "Wool Purchase Contract" contains terms not included in the oral discussion. The most important of these is the provision for discounts on buck and black wool, and tags. The record is bare of any discussion in the preliminary negotiations of these discounts, or of any custom or usage in this regard. Material, but not so important, are the "Contract" warranties of *good* merchantable condition, tying, freedom from dip, spear grease, excessive burrs and sand. On these terms, too, the negotiations were silent, and there is no custom or usage shown. The cumulative effect of these variances is to indicate clearly, first, that the parties had not completed their negotiations when the "Contract" was prepared, and second, that the "Contract" has but little identity with the oral negotiations. The court below gave no consideration to these variances, but, it is respectfully urged, they should not be dismissed so lightly. Such lack of identity or accuracy in a memorandum of an oral contract within the Statute of Frauds proved critical in *Friedman & Co. vs. Newman, supra.*

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALDEN T. HILL
HAROLD C. GREAGER
Counsel for Petitioner.

Fort Collins, Colorado
August 4, 1953

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STATUTES AND MISCELLANEOUS

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 239.

O. A. GREAGER, PETITIONER,

VS.

R. H. LINDSAY COMPANY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Colorado (R. 45) was not reported. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 107), and the dissenting opinion (R. 112) are reported at 204 F. (2d) 129.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals, on the record in this case, should have set aside as "clearly erroneous" the finding of the trial court that an oral contract of purchase and sale was not made.

2. Whether, under the laws of Colorado, the intention to express an agreement in a formal written contract creates a presumption that the execution of the written instrument shall be a condition of the agreement; and whether, if such presumption exists, it is applicable to the facts in the present cause.

3. Whether, on the record in this case, the buyer was entitled to the equitable remedy of specific performance; and whether this question is not moot because of a stipulation entered into between the parties whereby the parties performed the contract, but reserved the question of validity of the contract and damages for determination by the court.

4. Whether, under the laws of Colorado, the written memorandum in the present case was sufficient to satisfy the requirements of the Statute of Frauds.

STATUTES AND RULES INVOLVED

The Uniform Sales Act of the State of Colorado, provides, inter alia, (1935 Colorado Statutes Annotated, Chapter 143A; 1941 Session Laws of Colorado, pages 825, 826):

Sec. 1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

Sec. 3. Subject to the provisions of this act and of any

statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be inferred from the conduct of the parties.

1941 Session Laws of Colorado, page 826, § 4 provides:

(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum of the contract or sale be signed by the party to be charged or his agent in that behalf.

The Federal Rules of Civil Procedure provide:

Rule 52, Findings by Court

(a) Effect, In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarily set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

STATEMENT OF THE CASE

O. A. Greager is a 72-year-old sheepman of Norwood, Colorado (R.85). He has been engaged in the sheep business for over 25 years (R. 89). During that period of time, his net financial worth has increased from approximately $12,000.00 to about $300,000.00 (R. 89, 90).

The R. H. Lindsay Company is a wool merchant, incorporated in the State of Massachusetts. Its principle offices are located in Boston. G. A. Hansen is a vice-president and director of such corporation and maintains offices in Salt Lake City, Utah. William Kelly of Montrose, Colorado, is a resident buyer for such corporation (R. 8, 16, 29).

On April 21, 1950, Greager and Lindsay Company, by its agent, G. A. Hansen, entered into an agreement whereby Greager sold his entire 1950 wool clip to Lindsay Company, and such agreement was performed by both parties (R. 101-103, 93, 67, 68).

On October 29, 1950, Hansen and Kelly were buying wool in San Miguel County (R. 10). By chance they met Greager in a cafe in Norwood, and the conversation drifted to wool (R. 10, 85). All three then went to Greager's home, where a conversation occurred in reference to Greager's 1951 wool clip (R. 85).

Hansen testified: "He (Greager) asked me what I could pay him for his wool and I told him we had been paying from seventy-five cents to eighty cents per pound. He said, 'That's a very good price.' He said, 'Will you pay me that?' I said, 'I think I would,' and he said, 'Well, it's too good a price to refuse and I'll go in and discuss it with my wife,' and he left us in his own home and went into the kitchen and came back and said, 'We're satisfied; it's too good a price to turn down, so make out your contract.' Q. You said you were paying from seventy-five to eighty cents. What was the price finally agreed on or inserted in the contract?—A. I told him I'd pay him eighty cents, the highest price that had been paid. (R.10)

Kelly testified: "We went out to the house and Mr. Hansen asked him if he would take seventy-five cents for his wool. He asked him if he'd take eighty cents. He said he had been paying from seventy-five to eighty cents, and Mr. Greager went to the kitchen and talked to his wife and said that was a good price and he would take it." (R.28)

Greager testified: "I met Mr. Hansen and Mr. Kelly at the Lone Pine Cafe, not by appointment, just happened that way. Naturally, the conversation drifted into wool. He said, 'We would like to come down to the house to see you.' I said, 'O. K.' After we arrived at the house, the subject was on wool. I don't remember, just kinda by-play, so to speak, and Mr. Hansen says, 'I feel kinda weak today. Would you take 78 cents for your wool today?' I said, 'No, I would not.' And there had been a little off conversation, I don't recall, and then he said, 'Would you take 80 cents for your wool?' I hesitated. He says, 'That is what I sold mine for.' He reached over into his form book. He said 'I sold mine for 80 cents. Here's my contract.' I thought for a moment, there was no further conversation for just a little while. I said, 'You just write up that contract.' While he was writing it up, I went to the dinette—not the kitchen—and told the Missus, my wife, 'I am contracting my wool at 80 cents.' That was the extent, and the contract was signed, and it was my copy—it was handed to me." (R. 85, 86)

Greager then signed a printed form furnished by Hansen, entitled "Wool Purchase Contract" and Hansen witnessed the same (Plaintiff's Exhibit A, R. 4, 9, 43). This printed form was identical with the form used by the same parties in the previous contract whereby some six months earlier Greager had sold his 1950 wool clip to Lindsay Co. (R. 67, 4, 101-103).

On March 28, 1951, Greager notified Lindsay Co. that he withdrew from the contract, on the ground that the contract lacked mutuality and was therefore not binding on either party (R. 103, 104). The wool market at such time

was considerably higher than at the time the contract was made (R. 18).

Lindsay Co. instituted this action against Greager, the first claim for relief contained in the complaint requesting specific performance of the contract, and the second, damages for breach of contract (R. 2-4). Thereafter, the parties entered into a stipulation whereby Greager delivered his wool to Lindsay Co. and was paid the contract price for the wool (R. 40-42). The question of the validity of the contract was reserved for the Court, and damages to Greager were stipulated at 20¢ a pound in the event the contract was invalid, the price of wool at such time being $1.00 a pound (R. 40-42).

The cause was tried to the Court. After hearing the evidence presented and examining the transcript of the evidence introduced at the hearing on the preliminary injunction, the Court said:

"The facts are pretty well agreed upon. * * *. From the examination of the authorities and the exhibits in the case, and the stipulation of the parties and the evidence, including the evidence at the time of the hearing on the temporary injunction, all of which the Court has read, though be it somewhat hastily, the Court is of the opinion that the issue of law should be resolved in favor of the defendant.

I have no desire to overturn any well established practice in the wool-buying business, but it does seem to me that probably a so-called wool purchase contract might properly be written up as a contract which would obligate the purchaser to make a purchase and should be more than a mere memorandum under which it is hoped that the seller would sign a memorandum which would be sufficient to obviate the defense of the Statute of Frauds. I do not say that with any spleen or any criticism. It doesn't seem to me that there is a mutually binding contract entered into under the conditions and circumstances shown in the evidence and the stipulation in this case.

I am not sure there are any particular equities one way or the other, at least, if there were, they are taken out of the matter anyway by the signing of the stipulation, but perhaps the matter properly should have been resolved upon the motion for summary judgment in favor of the defendant, however, the Court is glad that it took the other view, and allowed you gentlemen to put on all of your evidence and to hear you fully upon your theories of the law, which is the government." (R. 98, 99)

Thereafter, the court entered memorandum findings of fact and opinion, concluding that no mutually binding oral contract was made, or intended to be made (R. 52), that no written contract was made as the written document lacked mutuality in that it contained no promise to buy on the part of Lindsay Co. (R. 53, 54), and that if such written document were intended to be a memorandum to satisfy the statute of frauds, it was insufficient to so do (R. 54, 55). Judgment for Greager was entered (R. 57), and Lindsay Co. appealed.

The Circuit Court of Appeals reversed the District Court, concluding that the evidence was not in substantial conflict, that an oral contract was made, and that the written document was sufficient to satisfy the Statute of Frauds.

ARGUMENT

I.

There is no Deviation From the Accepted and Unusual Course of Judicial Proceedings.

The first reason advanced by petitioner for the granting of a writ of certiorari appears to be that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. The argument is based upon the premise that the Circuit Court extended the scope of appellate review beyond the recognized

standards of this court and the Federal Rules of Civil Procedure.

The trial court found as a fact, that in the conversation between Hansen and Greager, no firm commitment was made to purchase Greager's 1951 wool clip (R. 49), and concluded as a matter of law, that no mutually binding oral contract of purchase and sale of Greager's 1951 wool clip was made or intended to be made (R. 52). The Circuit Court of Appeals considered the evidence in the case, concluded that an oral offer had been made to purchase Greager's wool, that Greager had accepted such offer, that an oral contract was made, and that the findings of the trial court to the contrary were clearly erroneous (R. 108, 110).

It is apparent that the appellate court applied the proper rule relative to findings of fact made by the trial court, namely, that such findings should not be set aside unless clearly erroneous. The appellate court determined that certain findings made by the trial court were clearly erroneous. Such action is certainly not a deviation from the accepted and usual course of judicial proceedings.

The decision of the Circuit Court of Appeals was clearly correct, as will appear in later argument. However, even assuming such decision to be incorrect, it does not follow that such fact would constitute such a deviation from the accepted and usual course of judicial proceedings as to warrant review by certiorari under the supervisory powers of this court, which seems to be the reasoning advanced by petitioner. Under such reasoning, every defeated litigant would be entitled to certiorari.

Petitioner seeks to have this court review the record in this cause and determine disputed questions of fact. We submit that even assuming petitioner to be correct in his contentions, no special or important reason appears in the argument of petitioner which would warrant the granting of certiorari, and a determination by this court of the disputed questions of fact.

II.

There is no Conflict of Decisions On Local Law.

The second reason advanced by petitioner for the granting of a writ of certiorari is that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

The Circuit Court of Appeals, in the first place, is alleged to have failed to give effect to a ruling of the Colorado Supreme Court that reasonable doubt as to whether what passed between the parties was only treaty must be resolved in favor of treaty and against the formation of a contract. It is further contended that the decision of the Circuit Court is probably in conflict with such Colorado ruling. No showing of any kind is made by petitioner that the Circuit Court of Appeals failed to follow such rule. As a matter of fact, the Circuit Court of Appeals, in holding the findings of the district court "clearly erroneous," applied a far stricter test than that of "reasonable doubt." If a "reasonable doubt" had existed in the minds of the Circuit Court as to whether the conversation between the parties created an oral contract, the Circuit Court would not have found the trial court's finding, that no oral contract was made, to be "clearly erroneous." It seems clear that this alleged conflict not only is not shown to exist, but also does not exist.

The Circuit Court of Appeals, in the second place, is alleged to have failed to give effect to rulings of the Colorado Supreme Court with respect to the sufficiency of a memorandum to satisfy the Statute of Frauds. It is further contended that the decision of the Circuit Court is probably in conflict with such Colorado decisions.

The Circuit Court stated in general terms that a memorandum is sufficient if it sets forth with reasonable certainty the names of the parties to the contract, a descrip-

tion of the goods to which the contract relates and the essential terms and conditions constituting the oral contract (R. 111). Such statement is a correct statement of Colorado law, *Micheli v. Taylor,* 114 Colo. 258, 159 P. 2d 912; *Eppich v. Clifford,* 6 Colo. 493. The Circuit Court applied such law, and concluded that all the essential elements were contained in the memorandum (R. 111). It is clear that there is no conflict between the decision of the Circuit Court and the decision of the Colorado Supreme Court.

Petitioner, in reality, is contending that the Circuit Court, although applying the correct Colorado law, erred in its application of such law to the facts in the present case. Even assuming such contention to be correct, no conflict is created as to local law.

We submit that plaintiff has failed to show a conflict of decisions of any kind. Furthermore, even had such conflict been shown, no argument is advanced and no showing is made that such conflict relates to an important question of local law, or that there are special or important reasons for reviewing such conflict on writ of certiorari.

III.

The Decision of the Circuit Court of Appeals Is Correct.

The facts contained in the statement of the case and in the opinion of the Circuit Court show on their face that the Circuit Court was correct in its decision. There is no question but what the parties argued about terms of sale, and reached an agreement. When Hansen left Greager's home, there was no question but what both Hansen and Greager knew that Hansen had purchased the wool, and Greager had sold it. Months later, after the price of wool had gone up, Greager noticed Hansen had signed the memorandum as a witness, and thereupon changed his mind (R. 95).

The trial court, however, confused the question of mutu-

ality of contract with the question of mutuality of remedy. The trial court, in effect, stated that as the contract could not be enforced by the seller because the buyer had not signed the memorandum, there was no contract (R. 99). This is clearly erroneous reasoning, as the two questions are separate. The Colorado Statute of Frauds requires that the memorandum be signed by the party to be charged. Under such a statute, it is clearly possible that a contract could be enforced by one party, and not by the other—and the mere fact that the contract could not be enforced by one party thereto would have no effect on the validity of a contract.

It is interesting to note that had Greager accepted the cash advance Hansen offered to make, there would have been no possibility of litigation, as such part payment would have satisfied the Statute of Frauds.

The Circuit Court of Appeals separated the questions confused by the trial court and first found that an oral contract existed, such finding being clearly correct under the evidence presented, and then concluded that the written memorandum was sufficient to satisfy the Statute of Frauds. Such conclusion was based on the law of the State of Colorado, as found in *Eppich v. Clifford,* 6 Colo. 493, and *Micheli v. Taylor,* 114 Colo. 258, 159 P. 2d 912, and is clearly correct.

At the hearing on the preliminary injunction in this cause, counsel for Greager stated that the entire transaction from start to finish "was fraught with fraud" (R. 24, 25). In the answer filed on behalf of Greager, the defense of fraud was specifically raised (R. 37, 38). The pre-trial order lists witnesses who were to testify as to fraud (R. 44). Such witnesses were not called by Greager, and no evidence was introduced to substantiate the defense of fraud. Such defense was clearly abandoned by Greager, as no evidence existed to substantiate it. The issue of fraud was not raised in the Circuit Court of Appeals, nor is it raised in this

court by either the "questions presented" or by the "specification of errors to be urged."

Petitioner, however, seems to be following in this court the same tactics used in the trial court, namely, to insinuate fraud. In the statement of the case contained in the petition (p. 5), the statement is made that Greager "was led to believe" and again (p. 11) that Greager had been "tricked into signing."

There is no fraud in this case. The good faith of Hansen is clearly shown by the fact that he offered to make an advance on the contract. Had the price of wool remained constant or gone down and stayed down after the transaction here in question occurred, it is doubtful whether this case would ever have been litigated. This court should completely disregard the assertions made by Petitioner which insinuate fraud in the transaction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Filed August 26, 1953.